

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**February 2, 2017**

Diane M. Fremgen  
Clerk of Court of Appeals

**NOTICE**

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2016AP612**

**Cir. Ct. No. 2013CV657**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**REVOLUTION PROCESSING SOLUTIONS, INC.,**

**PLAINTIFF-RESPONDENT,**

**V.**

**COLLINS FINANCIAL, LLC AND NICHOLAS COLLINS,**

**DEFENDANTS-APPELLANTS.**

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APPEAL from a judgment of the circuit court for Jefferson County:  
JENNIFER L. WESTON, Judge. *Affirmed.*

Before Kloppenburg, P.J., Lundsten and Blanchard, JJ.

¶1 PER CURIAM. Collins Financial, LLC, and its sole owner, Nicholas Collins (collectively the “Collins defendants”), appeal a circuit court judgment in favor of Revolution Processing Solutions, Inc. The parties’ dispute arises out of a contract between Collins Financial and Revolution Processing. The

Collins defendants argue that the circuit court erred by (1) relying on extrinsic evidence to construe unambiguous contract language, (2) holding Nicholas Collins personally liable for damages, (3) awarding punitive damages against Nicholas Collins, (4) violating the election of remedies doctrine, (5) awarding duplicate damages, (6) declaring that the judgment was non-dischargeable in bankruptcy, and (7) ordering the surrender of funds that belonged to Collins Financial. For the reasons below, we affirm.

### ***Background***

¶2 Collins Financial provides “merchant credit and debit card processing” services and related services. In 2008, Collins Financial entered into a contract with Revolution Processing that authorized Revolution Processing to solicit businesses that would then hire Collins Financial to provide the services described. According to the contract, Collins Financial would enter into “merchant agreements” with the individual merchants that Revolution Processing solicited.

¶3 We pause here to note that the parties sometimes use the term “merchant account” interchangeably with “merchant agreement.” If there is a difference between the terms that matters here, the Collins defendants fail to explain it. We use the term “merchant agreement” under the assumption that the terms have the same meaning.

¶4 As we understand it, Collins Financial and Revolution Processing, through their contractual relationship, generated monthly income based on fees relating to merchants’ customers’ use of credit or debit cards. The parties refer to this income as the “residuals” or the “residual stream.” The details of how this income stream worked are not important here.

¶5 In the contract provision that gives rise to this litigation, the disputed language provides that “all residual stream, right, title and interest in all Merchant Agreements is shared by” Collins Financial and Revolution Processing, with Collins Financial receiving 20% and Revolution Processing receiving 80%. The provision states, in full:

**Ownership of Merchants.** The parties understand and agree that all residual stream, right, title and interest in all Merchant Agreements is shared by both COLLINS FINANCIAL LLC and REVOLUTION PROCESSING SOLUTIONS, INC. sales office in the proportion of 20%-80% respectively.

¶6 In 2013, Collins Financial sold the merchant agreements to a company called Elavon. Collins Financial did not pay Revolution Processing any proceeds from the sale.

¶7 Revolution Processing brought suit against Collins Financial and Nicholas Collins, Collins Financial’s sole owner. Revolution Processing alleged a claim for breach of contract against Collins Financial based on Collins Financial’s failure to pay Revolution Processing 80% of the sales proceeds from the merchant agreements that Revolution Processing solicited. Revolution Processing also alleged tort claims including, as pertinent here, claims for conversion and civil theft against Nicholas Collins.

¶8 The circuit court granted summary judgment to Revolution Processing on its breach of contract claim against Collins Financial and, after a bench trial, found that Nicholas Collins committed conversion and civil theft as alleged. The court awarded a variety of relief, including the same amount of compensatory damages as to each of the three claims: \$152,000, representing the

amount that the court found Revolution Processing was owed under the contract. We reference additional facts as needed below.

### *Discussion*

¶9 We structure our discussion in seven parts, corresponding to the seven section headings in the Collins defendants’ briefing. Some of the briefing under these section headings raises more than one issue or contains arguments that overlap with arguments found under other section headings. We have attempted to address all of the Collins defendants’ significant arguments under the section heading that best fits the argument. We reject as insufficiently developed all arguments that we do not address. *See State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (we may decline to address undeveloped arguments).

#### *1. Construction of Contract Language*

¶10 As noted, the contract provision at issue states that “all residual stream, right, title and interest in all Merchant Agreements is shared by” Collins Financial and Revolution Processing, with Collins Financial receiving 20% and Revolution Processing receiving 80%. In granting summary judgment on Revolution Processing’s breach of contract claim, the circuit court concluded that this contract provision covers the proceeds from Collins Financial’s sale of the merchant agreements to Elavon.

¶11 On appeal, the Collins defendants argue that the circuit court construed this unambiguous provision by erroneously relying on extrinsic evidence, namely, evidence of a prior contractual relationship between Collins Financial and Elavon. We acknowledge that the circuit court relied on extrinsic

evidence, but the court also ruled in the alternative, regardless of extrinsic evidence. The Collins defendants' extrinsic-evidence argument disregards this alternative rationale that does not rely on extrinsic evidence. Moreover, our standard of review is *de novo*, meaning that we may affirm based on this alternative rationale, regardless of the circuit court's reasoning. See *Betz v. Diamond Jim's Auto Sales*, 2014 WI 66, ¶24, 355 Wis. 2d 301, 849 N.W.2d 292 (interpretation of an unambiguous contract is a question of law for *de novo* review); *Foremost Farms USA Coop. v. Performance Process, Inc.*, 2006 WI App 246, ¶10, 297 Wis. 2d 724, 726 N.W.2d 289 (appellate court reviews summary judgment *de novo*). That is, it is the Collins defendants' burden on appeal to persuade us that the circuit court's contract interpretation was incorrect, regardless of the circuit court's reasoning.

¶12 As to the circuit court's alternative rationale, the Collins defendants' appellate argument is poorly developed and could be rejected on that basis. Nonetheless, we choose to address the circuit court's alternative rationale that does not rely on extrinsic evidence.

¶13 We agree with the circuit court that, regardless of any alleged extrinsic evidence, the contract provision at issue unambiguously granted Revolution Processing an 80% ownership interest in the sales proceeds resulting from the sale of merchant agreements solicited by Revolution Processing. While the provision might have been drafted even more clearly, its title, "**Ownership of Merchants**," and its broad reference to "*all residual stream, right, title and interest in all Merchant Agreements*" (emphasis added), plainly indicate an intent to create shared ownership rights in the merchant agreements, with 20% going to Collins Financial and 80% going to Revolution Processing. In the absence of language more specifically addressing the sale of merchant agreements—and the

Collins defendants point to nothing more specific—the language giving Revolution Processing 80% of “all ... right, title and interest in” the merchant agreements plainly gives Revolution Processing the right to 80% of the proceeds from a sale of the merchant agreements.

## 2. *Nicholas Collins’ Personal Liability*

¶14 As noted, after a bench trial, the circuit court concluded that Revolution Processing proved tort claims for conversion and civil theft against Nicholas Collins. Among the court’s many underlying factual findings were that Nicholas Collins “reached into the Collins Financial, LLC account” and spent most of the sales proceeds, largely on personal expenditures. Based on these tort claims, the court held Nicholas Collins personally liable for damages.

¶15 The Collins defendants argue that the circuit court improperly held Nicholas Collins personally liable. Under the banner of this argument, they appear to make four sub-arguments. None of these arguments persuade us.

¶16 First, the Collins defendants argue that the court could not hold Nicholas Collins personally liable without piercing the corporate veil. We begin by noting that, although it seems the court declined to pierce the corporate veil, the court’s underlying findings appear to support doing so. Regardless, the Collins defendants provide scant support for the argument that it was necessary to pierce the corporate veil.

¶17 The Collins defendants argue that, under WIS. STAT. § 183.0304(1), an LLC member cannot be held personally liable for the wrongs *of the LLC*.<sup>1</sup> But

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<sup>1</sup> WISCONSIN STAT. § 183.0304(1) provides:

(continued)

this argument does not address whether Nicholas Collins can be held liable *for his own tortious conduct*. If what the Collins defendants mean to argue is that § 183.0304(1) immunizes Nicholas Collins from personal liability because he committed tortious acts solely *in his capacity as a member or manager of Collins Financial*, the Collins defendants do not develop such an argument with reference to pertinent facts. See ***Brew City Redevelopment Grp., LLC v. Ferchill Grp.***, 2006 WI 128, ¶41, 297 Wis. 2d 606, 724 N.W.2d 879 (explaining that, under § 183.0304, LLC members are *not* immune from personal liability for tortious conduct if the conduct was undertaken in a member’s individual capacity and not as a member or manager of the LLC). Accordingly, we are not persuaded that § 183.0304(1) immunizes Nicholas Collins from personal liability.

¶18 The Collins defendants’ second argument relating to Nicholas Collins’ personal liability is difficult to follow, but appears to go something like this: Assuming, as the circuit court concluded, that Collins Financial breached its contract with Revolution Processing by failing to pay the sales proceeds owed, the court could not also logically conclude that Nicholas Collins personally “took” the sales proceeds. The Collins defendants assert that “either Collins Financial took the money or Nicholas did, but both could not.” We find these and related

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The debts, obligations and liabilities of a limited liability company, whether arising in contract, tort or otherwise, shall be solely the debts, obligations and liabilities of the limited liability company. Except as provided in ss. 183.0502 and 183.0608, a member or manager of a limited liability company is not personally liable for any debt, obligation or liability of the limited liability company, except that a member or manager may become personally liable by his or her acts or conduct other than as a member or manager.

All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

assertions about which defendant was the “wrongdoer” here to be so general as to be meaningless. Among other potential failings, these assertions do not address the differences between a breach of contract claim and a tort claim for conversion or civil theft.

¶19 The Collins defendants’ third personal liability argument is that, if Nicholas Collins “stole” the sales proceeds from anyone, he stole them from *Collins Financial*, not Revolution Processing. As explained above, however, the contract provided that Revolution Processing, as well as Collins Financial, had an ownership interest in the proceeds.

¶20 The Collins defendants’ fourth and final personal liability argument is directed solely at the civil theft claim. They begin this argument by asserting that the circuit court, “without explanation,” found Nicholas Collins guilty of civil theft. We disagree that the court provided no explanation. Regardless, the Collins defendants, as the appellants here, have the burden of persuasion to demonstrate circuit court error. The Collins defendants do not meet this burden. Their argument is that this case is like *Aslanukov v. American Express Travel Related Services Co.*, 426 F. Supp. 2d 888, 892-93 (W.D. Wis. 2006), in which the court rejected application of the same theft statute.<sup>2</sup> However, the court in *Aslanukov*

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<sup>2</sup> The pertinent theft statute requires proof of the following:

By virtue of his or her office, business or employment, or as trustee or bailee, having possession or custody of money or of a negotiable security, instrument, paper or other negotiable writing of another, intentionally uses, transfers, conceals, or retains possession of such money, security, instrument, paper or writing without the owner’s consent, contrary to his or her authority, and with intent to convert to his or her own use or to the use of any other person except the owner.

WIS. STAT. § 943.20(1)(b).

rejected application of that statute only after concluding that the alleged victim lacked an ownership interest in the funds at issue. *See id.* at 889, 892-93. Here, as we have indicated, Revolution Processing had an ownership interest in the sales proceeds by virtue of its contract with Collins Financial.

### 3. *Punitive Damages Against Nicholas Collins*

¶21 The Collins defendants argue that the circuit court improperly awarded \$50,000 in punitive damages against Nicholas Collins based on the civil theft claim. Most of their arguments go to the underlying civil theft claim and are arguments that we have already rejected. Aside from that, the Collins defendants appear to assert that punitive damages against Nicholas Collins ran afoul of a contract provision limiting punitive damages. However, they develop no argument explaining why that contract provision applies to Nicholas Collins personally or, if it does, why an exception for “gross negligence, recklessness, or willful misconduct” does *not* apply. Accordingly, we reject the Collins defendants’ reliance on this contract provision.

### 4. *Election of Remedies Doctrine*

¶22 The next section of the Collins defendants’ briefing states: “The circuit court erred in permitting [Revolution Processing] to try its tort claims after the court awarded [Revolution Processing] a summary judgment on its contract claim.” When we look to the Collins defendants’ supporting assertions and case citations, we conclude that they present two election of remedies arguments. The Collins defendants argue (1) that the circuit court acted inconsistently with an election of remedies case, *Wills v. Regan*, 58 Wis. 2d 328, 206 N.W.2d 398 (1973), and (2) that the court violated the rule against double recovery, *see Appleton Chinese Food Serv., Inc. v. Murken Ins., Inc.*, 185 Wis. 2d 791, 807,

519 N.W.2d 674 (Ct. App. 1994) (“The real purpose of the [election of remedies] doctrine is to prevent double recovery.” (quoted source omitted)).

¶23 As to *Wills*, we see no inconsistency. It is true that the plaintiff in *Wills* was required to elect between pursuing a tort claim and pursuing a contract claim. See *Wills*, 58 Wis. 2d at 333, 342-45. In *Wills*, however, the court concluded that there was only one underlying cause of action alleged, namely, negligence, and that the nominal contract claim added nothing because the complaint alleged no express contract and no implied contract terms other than an implied term that “the patient will be treated with proper skill and care.” See *id.* at 342-45. The Collins defendants provide no explanation for why the situation here is analogous to *Wills*, and we fail to see how it is. The contract and tort claims here are plainly different from one another. For example, the civil theft claim included an allegation that was not required for the contract claim, namely, that Nicholas Collins acted with the intent to deprive Revolution Processing of its ownership interest in the merchant agreements. See WIS. STAT. § 943.20(1)(b).

¶24 As to the rule against double recovery, the Collins defendants’ argument fails because, as we now explain, their underlying assertion that the judgment requires compensatory damages greater than \$152,000 is incorrect.

¶25 It is undisputed, for purposes of this issue, that Revolution Processing was entitled to recover compensatory damages totaling \$152,000. The Collins defendants argue, however, that the court violated the rule against double recovery by awarding \$152,000 in compensatory damages on *each* of Revolution Processing’s three claims. They argue, as we understand it, that the court in effect awarded \$456,000 in total compensatory damages, providing Revolution Processing with a *triple* recovery. They assert that “per the literal reading of the

court’s decision [Revolution Processing] is entitled to recover \$152,000 three times.” We disagree.

¶26 The circuit court referenced the compensatory damages award in multiple written decisions, including its final judgment. We acknowledge that certain parts of those decisions, *if read in isolation*, might be ambiguous. Reading the decisions together, however, the court clearly awarded *a total* of \$152,000 in compensatory damages for which the Collins defendants are jointly and severally liable. That is, the court clearly determined that Revolution Processing can collect no more than \$152,000 in total compensatory damages, but that each Collins defendant is liable for up to the full amount of \$152,000. The court made its intent particularly clear in the part of its December 9, 2015 decision stating: “The Judgment(s) shall be crafted such that *the* \$152,000 underlying amount is joint and several as between Collins Financial, LLC and Nicholas Collins ....” (Emphasis added.) Similarly, the final judgment, fairly read as a whole, shows that the total compensatory damages amount is \$152,000 against both defendants jointly and severally.<sup>3</sup>

¶27 We are uncertain if the Collins defendants mean to make other arguments relating to the appropriateness of joint and several liability here. If so, they do not present a developed argument and, therefore, we do not address the topic.

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<sup>3</sup> If there is more to the Collins defendants’ “triple” recovery argument than we have discussed in the text, that argument appears to be based on a seeming misunderstanding of joint and several liability as permitting a winning party to recover the total damages amount more than once. The Collins defendants provide no support for such an interpretation of this common liability language.

### 5. *Duplicate Damages*

¶28 The Collins defendants argue that the circuit court improperly awarded duplicate damages. This duplicate damages section of the Collins defendants' briefing is nothing more than another way of arguing the rule-against-double-recovery argument that we have rejected above. We need not revisit it, and move on to the next issue.

### 6. *Judgment as Non-Dischargeable in Bankruptcy*

¶29 The Collins defendants argue that the circuit court improperly declared the judgment in this case non-dischargeable in bankruptcy. They assert, and Revolution Processing agrees, that the federal bankruptcy court has exclusive jurisdiction to make this determination. Taking the parties' agreement on this point at face value, we fail to see why the circuit court's ruling on the topic matters. The Collins defendants suggest no reason why it would. For example, the Collins defendants do not demonstrate how Revolution Processing might *successfully* rely on any statement by the circuit court to undermine federal court authority to discharge the debt in a bankruptcy, should that be appropriate. Thus, we decline to reverse on the basis of any error as to whether the judgment is non-dischargeable.

### 7. *Surrender of Funds That Belonged to Collins Financial*

¶30 The Collins defendants argue that the circuit court improperly ordered the surrender of \$35,000 in funds that belonged to Collins Financial. For the reasons that follow, the Collins defendants fail to persuade us that the court's handling of the funds constitutes reversible error.

¶31 Putting this argument in context requires a few additional facts. The funds in question were in a Collins Financial bank account and, as we understand it, consisted of the sales proceeds that Nicholas Collins had not already spent. Initially, the circuit court issued a temporary injunction ordering a transfer of the funds into the Collins defendants' attorney's trust account. Subsequently, the court ordered that, upon entry of the final judgment, the funds must be paid to Revolution Processing and credited against the \$152,000 compensatory damages amount.

¶32 In their argument regarding the \$35,000 in funds, the Collins defendants focus on the court's *temporary* injunction, and argue that the temporary injunction was, in effect, an improper attachment or "freezing" of assets. They cite federal case law addressing the scope of a court's power to grant preliminary injunctions or other pre-judgment relief. *See Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 333 (1999); *Mitsubishi Int'l Corp. v. Cardinal Textile Sales, Inc.*, 14 F.3d 1507, 1521-22 (11th Cir. 1994).

¶33 However, we fail to see why the *temporary* injunction, erroneous or not, now matters. The Collins defendants do not identify any way in which, during the period between the temporary injunction and the entry of judgment, they were affected by the unavailability of the \$35,000 in funds. As far as we can tell, what matters is whether the circuit court had authority to later require, upon entry of judgment, that the funds be paid to Revolution Processing. On *that* topic, we lack briefing. Instead, all we have is an assertion that the court's approach resulted in an improper garnishment. As noted earlier, we need not consider undeveloped arguments. *See Pettit*, 171 Wis. 2d at 646-47.

***Conclusion***

¶34 For the reasons above, we affirm the circuit court’s judgment against Collins Financial and Nicholas Collins.

*By the Court.*—Judgment affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5.

